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NTSB Order No. EA-4187

UNITED STATES OF AMERICA  
**NATIONAL TRANSPORTATION SAFETY BOARD**  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 26th day of May, 1994

_____	)	
DAVID R. HINSON,	)	
Administrator,	)	
Federal Aviation Administration,	)	
	)	
Complainant,	)	
	)	Docket SE-13368
v.	)	
	)	
CHRISTIAN EKREM,	)	
	)	
Respondent.	)	
_____	)	

**OPINION AND ORDER**

The Administrator has appealed from the oral initial decision of Administrative Law Judge Jerrell R. Davis, rendered on February 4, 1994, in an emergency revocation proceeding.<sup>1</sup> By that decision, the law judge granted respondent's motion to dismiss at the conclusion of the Administrator's case-in-chief

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<sup>1</sup>An excerpt from the hearing transcript containing the initial decision is attached. Respondent waived the strict deadline requirements of an emergency proceeding and also filed a brief in reply.

for failure to establish a prima facie case. After careful review of the record, we reverse the initial decision and remand for further proceedings.

The Administrator's revocation order (complaint) charged respondent with violations of sections 61.59(a)(2), 135.243(a), 135.244(a)(2), 135.297(a), and 91.13(a) of the Federal Aviation Regulations ("FAR," 14 C.F.R. Parts 61, 91, and 135), and section 610(a)(2) of the Federal Aviation Act of 1958.<sup>2</sup> It was alleged that on October 21, 1991, respondent acted as pilot-in-command (PIC) of a regularly-scheduled flight in passenger carrying operations for Pacific Coast Airlines (PCA) when he did not have an Airline Transport Pilot (ATP) certificate and had not yet completed the requisite proficiency check, and that respondent falsified the aircraft log book, writing that it had been a Part 91 flight, when he was aware that the flight was conducted under Part 135.

The law judge found that: 1) the subject flight was a Part 135 flight; 2) respondent acted as PIC of the flight; and 3) respondent had not been qualified to act as PIC of the flight (Transcript (Tr.) at 634), yet, the law judge dismissed the complaint because he was "persuaded that respondent had a reasonable basis for determining that the ... flight was conducted under Part 91." (Tr. at 636.) He also concluded that respondent did not have actual knowledge that the log entries

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<sup>2</sup>The revocation order is essentially reproduced in the law judge's decision, attached. See Appendix for text of the pertinent regulations.

were false.

On appeal, the Administrator contends that there was no basis for the dismissal of the several charges relating to Part 135, and that the law judge applied the incorrect standard when evaluating whether prima facie evidence of intentional falsification existed to support the section 61.59(a)(2) charge. We agree with both contentions.

From all that appears in the initial decision, we have to conclude that the law judge dismissed the Part 135 charges on the theory that, if respondent had a reasonable belief that the flight was conducted under Part 91, the Part 135 violations could not be sustained. Such a theory is not consistent with Board precedent, and the initial decision provides absolutely no reasoning on which to conclude that a departure from precedent is warranted.<sup>3</sup> What evidence the Administrator introduced at hearing indicates that respondent was engaged in an artifice which, even if it could be believed by respondent to have technically converted a Part 135 flight to a Part 91 operation, would not have disclosed to the passengers that they were not receiving the level of safety intended for them by the Part 135 regulations. Indeed, the law judge concluded that the flight was a Part 135 flight and, while respondent may now introduce evidence to dissuade the trier of fact from this belief, this initial presumption makes the dismissal of the Part 135 charges inexplicable.

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<sup>3</sup>See Administrator v. Miller, NTSB Order No. EA-3581 (1992).

Additionally, and in regard to the section 61.59(a)(2) charge, we note that in determining whether the Administrator has set forth a prima facie case, a law judge must consider the factual evidence in the light most favorable to the Administrator. Factual evidence strong enough to call for a response thus establishes a prima facie case. Administrator v. Kiscaden, NTSB Order No. EA-3618 at 3, n. 4 (1992). In the instant case, the law judge found that the flight was a Part 135 flight, not a Part 91 flight, as respondent maintains and as he allegedly entered in one version of the logs that are said to have existed for this flight. The law judge thus concluded that the representation was false, but further determined that respondent had no actual knowledge of the entry's falsity, a necessary component of the violation.<sup>4</sup> In reaching this last conclusion, the law judge relied on parts of the testimony of the second-in-command, who, as a witness called by the Administrator, stated that although PCA's owner bullied them into taking the flight, she and respondent decided not to take the tickets of the passengers, believing that this would convert the Part 135 flight into a Part 91 flight. However, the Administrator had presented evidence that respondent knew that it was a regularly scheduled flight, that he was not qualified to act as PIC, and that he

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<sup>4</sup>A charge of intentional falsification must be supported by evidence of 1) a false representation by respondent; 2) in reference to a material fact; that was 3) made with knowledge of its falsity. Hart v. McLucas, 535 F.2d 516, 519 (9th Cir. 1976). This includes a finding of intent to falsify. Administrator v. Blanton, NTSB Order No. EA-3840 at 6 (1993).

intentionally wrote incorrect information in the aircraft flight log. The Administrator also introduced testimony of PCA's chief pilot and other substantial evidence that respondent knew that the flight had been conducted under Part 135 of the FARs. Given the presumptions that pertain to a ruling on a motion of this type, the law judge should have proceeded with the case. This was prima facie evidence on all essential elements of the violation and called for a response.

While it is regrettable that the parties must go to the expense and trouble to reconvene, we are nevertheless constrained to reverse and remand this case to the law judge for further hearing necessary to a decision on the merits.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. The Administrator's appeal is granted;
2. The initial decision is reversed; and
3. The case is remanded to the law judge for further proceedings.

VOGT, Chairman, HALL, Vice Chairman, LAUBER and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

**APPENDIX****§ 61.59 Falsification, reproduction, or alteration of applications, certificates, logbooks, reports, or records.**

(a) No person may make or cause to be made-

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(2) Any fraudulent or intentionally false entry in any logbook, record, or report that is required to be kept, made, or used, to show compliance with any requirement for the issuance or exercise of the privileges, or any certificate or rating under this part.

**§ 135.243 Pilot in command qualifications.**

(a) No certificate holder may use a person, nor may any person serve, as pilot in command in passenger-carrying operations of a turbojet airplane, of an airplane having a passenger seating configuration, excluding any pilot seat, of 10 seats or more, or a multiengine airplane being operated by the "Commuter Air Carrier"... , unless that person holds an airline transport pilot certificate with appropriate category and class ratings and, if required, an appropriate type rating for that airplane.

**§ 135.244 Operating experience.**

(a) No certificate holder may use any person, nor may any person serve, as a pilot in command of an aircraft operated by a Commuter Air Carrier... in passenger-carrying operations, unless that person has completed, prior to designation as pilot in command, on that make and basic model aircraft and in that crewmember position, the following operating experience in each make and basic model of aircraft to be flown:

\* \* \* \*

(2) Aircraft multiengine, reciprocating engine-powered - 15 hours.

**§ 135.297 Pilot in command: Instrument proficiency check requirements.**

(a) No certificate holder may use a pilot, nor may any person serve, as a pilot in command of an aircraft under IFR unless, since the beginning of the 6th calendar month before that service, that pilot has passed an instrument proficiency check under this section administered by the Administrator or an authorized check pilot.

**§ 91.13 Careless or reckless operation.**

(a) Aircraft operations for the purpose of air navigation.  
No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

§ 610 of the Federal Aviation Act of 1958.

(a) It shall be unlawful -

\* \* \* \*

(2) For any person to serve in any capacity as an airman in connection with any civil aircraft, aircraft engine, propeller or appliance used or intended for use, in air commerce without an airman certificate authorizing him to serve in such capacity, or in violation of any term, condition, or limitation thereof, or in violation of any order, rule, or regulation issued under this title.